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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 236

RICHARD MORFORD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Richard Morford prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the District of Columbia Circuit, rendered June 13, 1949, petition for rehearing denied on July 8, 1949, which decision affirmed a judgment of the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia) convicting petitioner of violating Rev. Stats. § 102, as amended by Act of June 22, 1938, c. 594, 52 Stat. 942, U.S.C., Title 2, § 192.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. It appears in the record at 439-442.

Summary Statement of Matter Involved

Richard Morford, the petitioner herein, was convicted for his refusal to turn over to the House Committee on

Un-American Activities, herein called the Committee, certain records of the National Council of American-Soviet Friendship, Inc., herein referred to as the Council. Since a statement of the nature and program of the Council is essential to an understanding of the issues in this case, it will be desirable to set these out at the outset.

The Council was organized in 1943 for the following purpose: "To promote better understanding and strengthen friendly relations between the United States and the Soviet Union as essential to the winning of the war, and the establishment of world-wide democracy and enduring peace." (Gov. Exh. 10[1]). The Council has described its program as one "designed to carry out the above purpose (1) by meeting the demand of the American people for reliable information on all aspects of Soviet life, (2) by giving them an opportunity to express their admiration and friendship for our Russian Ally, and (3) by taking specific action against anti-Soviet propaganda aimed at dividing the United Nations." (Gov. Exh. 10).

The Council carried out this program by a number of methods including: a series of exhibits, photographic and otherwise, on life in the Soviet Union, widely circulated through museums, libraries, schools and colleges; the issuance of many pamphlets on Soviet life and American-Soviet relations, sold at book stores and public meetings; publicizing films dealing with the Soviet Union; conducting a speakers bureau; holding public meetings, rallies and dinners, attended on occasion by the highest government officials of the United States, Great Britain and U.S.S.R.;

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[1] By stipulation certain exhibits presented at the trial were not printed in the record, but ten sets of these exhibits have been separately bound and submitted to the Court in their original format. These exhibits are Government's Exhibits 4 and 10, and Defendant's Exhibits 65, 66, 71, and 90. Accordingly, these exhibits will be referred to throughout the petition by reference to exhibit number, and no record citations will be given thereto.

issuing statements signed by prominent persons counteracting specific anti-Soviet propaganda. Much of the work of the Council was carried on by professional and cultural committees, on which served many leaders in their respective fields of endeavor. These committees included the following: Artists Committee, Paul Manship, Chairman, which together with the Metropolitan Museum of Art in New York City sponsored an exhibition of "Soviet Artists in the War" at the Museum; Architects Committee, Harvey Wiley Corbett, Chairman, which arranged for and sponsored exhibits on Soviet architecture at the Architectural League in New York, at Cornell University, and elsewhere; Dance Committee, Agnes DeMille, Chairman, which exchanged material on the dance with dancers in the Soviet Union; Music Committee, Dr. Serge Koussevitzky, Chairman, which arranged for special broadcasts and concerts of Russian music and the transmission of records to the Red Army; Theatre Committee, headed by Margaret Webster; a Science Committee, headed by Professors Walter B. Cannon, and Gilbert N. Lewis, Honorary Chairmen, and Dr. L. C. Dunn, Chairman; Education Committee, headed by Herbert Davis, President of Smith College, which organized the "Workshop of the Soviet Union" held at Harvard Graduate School of Education; and a Committee of Women, headed by Mrs. Joseph E. Davies as Honorary Chairman, which sent exhibits to the Soviet Union and held conferences dealing with women and children's problems in U.S.A. and U.S.S.R. The Council carried on its functions in various cities through local Councils. (R. 323-347; 354-359).

On November 13, 1945, Ernie Adamson, counsel for the Committee on Un-American Activities, asked the Council for certain financial data. (R. 224). The Council declined to supply the information requested, taking the position that it would gladly furnish the Committee with all of its

publications and printed material, but that the Committee had no authority to demand the financial records of the Council. (R. 225-234). This position of the Council was set out in a letter to the Committee by Mr. Corliss Lamont, Chairman of the Council:

> The activities of the National Council have been open and nation-wide and reported constantly in the public press. Our organization has nothing to conceal. Your Committee has failed to indicate in what manner the activities of the Council bring it within the scope of the investigation that the House of Representatives has authorized your Committee to make. Nor has your Committee given any reason for its demands upon us, though we have repeatedly asked for one.
>
> The National Council does not, to quote the House resolution on this matter, engage in "un-American propaganda activities." It is not "subversive" in any way; and it does not attack "the principle of the form of government as guaranteed by our Constitution."
>
> Your Committee must be aware that inherent in its request is the inference that helping the American people to understand our Soviet Ally and promoting American-Soviet amity are un-American and subversive. For us to yield to a request based on this erroneous inference would not merely cause wanton injury to the work of the National Council, but would also have a deleterious effect upon America's foreign relations and thus be of disservice to our country. In fact, the request of your Committee, if pursued, would in itself contribute to the present reckless campaign to undermine those friendly relations between America and Russia upon which the peace of the world depends (R. 233-234).

Thereafter Mr. Lamont was subpoenaed by the Committee and appeared before it on January 23, 1946. He left a statement with the Committee (Def. Exh. 65), in which he furnished more information about the Council and its activities as a basis for objecting to the Committee's sub-

poena and demand for membership and financial records. He also left with the Committee more than 50 of the publications of the Council and a report on and description of all of its activities, to support the contention in his statements that an investigation of the Council was outside of the scope of the Committee's power, and that the Committee was injuring the Council in its work and thus "contributing to the present campaign to undermine those friendly relations between America and Russia upon which the peace of the world depends." (R. 102; Def. Exh. 65, p. 3; for list of publications submitted see Def. Exh. 66, p. 4).

The publications of the Council which were left by Mr. Lamont with the Committee on January 23, though voluminous, were apparently examined by the Committee in short order. Under date of January 31, 1946 the Committee advised Mr. Lamont that he would have to testify because the Council's literature contained "political propaganda". (R. 234). He was requested to appear and did appear before the Committee on February 6, 1946, at which time he filed a statement (Def. Exh. 66), in which he renewed his objections to the Committee's investigation and demand for records, (R. 235-243). At this hearing Mr. Lamont also informed the Committee that he was not the custodian of the Council's records but that the petitioner, as the Executive Director of the Council, had custody of all records. (R. 155-156).

On February 6, 1946, the Committee issued a subpoena to the petitioner, as follows:

> To the Sergeant At Arms, or his Special Messenger:
>
> You are hereby commanded to summon Mr. Richard Marford [sic], Director of the National Council of American-Soviet Friendship, Inc., . . . to be and appear before the Un-American Activities Committee of the House of Representatives of the United States . . . and to produce all books, records, papers and docu-

ments showing all the receipts and disbursements of money by the National Council of American-Soviet Friendship, Inc., and all correspondence, memoranda and communications with any and all persons, together with a complete list of all affiliated organizations, for the year 1945 . . . on February 20, 1946, at the hour of 10:00 o'clock A.M., then and there to testify touching matters of inquiry committed to said Committee; . . . (R. 251-252).

By arrangement Mr. Morford did not appear until March 6, 1946. On that date he refused at the hearing to produce the records and presented a statement, subscribed by Mr. Lamont and himself, asserting that the demand for the records of the Council was unconstitutional and unreasonable and made for the improper purpose of injuring the Council. (Def. Exh. 71; R. 72, 106).[2]

At the hearing the petitioner was asked to give the names of the members of the publications committee of the Council responsible for its periodical publication, the "Reporter," Congressman Mundt stating as the reason for the request that the publication contained statements "about the wisdom of which we have doubts" (R. 14). The petitioner declined to give the names "on the basis of principle". (R. 15).—After consulting counsel, he persisted in his refusal, saying in part: "I decline. This publication is a publication of the Council and will stand on its own merits. I think there is nothing in that statement that in any way can be construed as being un-American or subversive. We are entitled to an opinion, and under our rights under the First Amendment, and on that basis then, unless you can make a judgment about that this is satisfactory in proving that to be un-American and subversive, then, if it is not

[2] The transcript of the hearing was received in evidence as an exhibit which is not printed in the record as such. Pertinent portions of the transcript are, however, printed in the record as Exhibits A and B to the Supplemental Bill of Particulars (R. 7-18).

false, beyond that it is not our responsibility to furnish further information. It does not make any difference who wrote that particular article or who the particular committee was that stands behind that article". (R. 17, 18).

On March 31, 1947, an indictment was filed against the petitioner in the District Court for the District of Columbia. It contained two counts, and read in part as follows:

> Richard Morford was summoned as a witness by authority of the House of Representatives, through its Committee on Un-American Activities, to produce before the said Committee records upon the matter under inquiry committed to said Committee by the Resolution aforesaid, that is to say, all books, records, papers and documents showing all the receipts and disbursements of money by the National Council of American-Soviet Friendship, Inc., and all correspondence, memoranda and communications with any and all persons, together with a complete list of all affiliated organizations, for the year 1945. He appeared before the said Committee at its session in the District of Columbia on March 6, 1946, but then and there refused to produce the said record upon the matter under inquiry and thereby wilfully made default.
>
> Richard Morford . . . was asked by the Committee who were the members of the publications committee of the National Council of American-Soviet Friendship, Inc., which prepared and edited a publication known as "Reporter," which question was pertinent to the inquiry which the Committee on Un-American Activities was then conducting, . . . and Richard Morford refused to answer that question (R. 2-3).

A motion to dismiss the indictment or in the alternative for a bill of particulars (R. 4-5), was denied by Justice Holtzoff in an opinion dated May 21, 1947 (R. 18-29). *United States* v. *Bryan*, 72 F. Supp. 58.

Prior to the ruling on the motion, the prosecution had replied to the petitioner's request for particulars. (R. 6-18).

With regard to the petitioner's request that the prosecution "state the matter that was under inquiry at the March 6, 1946 session of the Committee on Un-American Activities and specify in what particular or particulars the documents called for by the summons or subpoena were material to the matter under inquiry" (R. 5), the prosecution replied that the "matter under inquiry was that part of the matter which related to the National Council of American-Soviet Friendship, Inc., and organizations affiliated therewith and individuals connected therewith" (R. 6). The same meaningless response was made to the petitioner's request with regard to the second count that the prosecution "state the matter that was under inquiry . . . and specify in what particular or particulars the question or questions propounded to the defendant which he is alleged to have refused to answer were pertinent to the question under inquiry" (R. 5, 6).

The trial court denied the petitioner's motion to disqualify all government employees as jurors (R. 56), and also refused to permit the questioning of government workers who were members of the jury panel as to the effect their government service might have on their verdict in this case. (R. 57, 58, 60-65). Four Government employees sat on the jury which brought a verdict of guilty (R. 65-68, 219), all defense challenges having been exhausted (R. 69).

Prior to the trial, the appellant served a subpoena *duces tecum* on the Clerk of the House of Representatives, requesting among other things material in the possession of the House Committee on Un-American Activities relating to the National Council of American-Soviet Friendship, Inc. (R. 32-39). This subpoena was not honored. During the course of the trial, the appellant made several requests that the trial court take steps to enforce this subpoena, all of which were denied by the trial court, (R. 83-85, 111-113, 122-123). The Government, however, had full access to the

files of the Committee and introduced considerable material from these files. (R. 70, 71, 76, 77, 97, 121, 122).

No evidence was introduced at the trial to show that a quorum of the Committee was present at the time of the alleged contempt.

The trial court denied appellant's motions for judgment of acquittal, and to dismiss the indictment. (R. 126, 127, 130, 191-195, 197, 202, 203).

The jury returned a verdict of guilty (R. 219). Motions for new trial and in arrest of judgment were denied (R. 220-222), and on April 30, 1948, the petitioner was sentenced to imprisonment for three months and to pay a fine of $250 (R. 222).

The conviction was affirmed by the Court of Appeals for the District of Columbia on June 13, 1949 (R. 443). That court held that the Committee was empowered to demand the Council's membership and financial records because the Council's propaganda was "an attack on the principle of our form of government" within the meaning of the Committee's authorizing resolution. The court reached this conclusion on the basis of its findings that the Council's propaganda was "pro-Soviet in character, consistently critical of the foreign policy of the United States," contained "unstinted praise of the communistic regime in Russia," and compared "Soviet official behavior with that of the United States to the disparagement of the latter" (R. 440-441). This view of the nature of the Council's literature, as we subsequently show, is not supported by the record, and indicates that the court below cannot have made an adequate examination of the record. The court below also found that the Committee had concluded that the Council's propaganda attacked "the principle of our form of government" (R. 441). This finding has no warrant in the record, and, as we subsequently demonstrate, is con-

tradicted by the record. The result is that propaganda which even the Committee on Un-American Activities, not normally noted for restraint, failed to characterize as "subversive" has been so classified by a federal Court of Appeals.

A petition for rehearing called the attention of the court below to its failure to indicate what "principle of the form of government as guaranteed by our Constitution," had been attacked by the Council (R. 444). The petition was denied without opinion on July 8, 1949. (R. 445).

Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on June 13, 1949 (R. 443). A petition for rehearing was denied on July 8, 1949 (R. 445).

The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254.

Statute and Resolution Involved

(a) Rev. Stats. §102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U.S.C. Title 2, §192:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or, who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

(b) House Resolution No. 5, 79th Cong., 1st Sess., 91 Congressional Rec. 10, 15 (1945):

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from

time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

(The House Committee with the identical authorization as set out above was made a permanent committee by sec. 121(b) of the Legislative Reorganization Act, 60 Stat. 828).

Questions Presented

1. (a) Was the House Committee on Un-American Activities authorized, under its enabling resolution, to compel the production of the Council's financial records, communications, and other papers, and to require the disclosure of the identity of the editors of the Council's publication?

(b) Was it so authorized even though the Committee had not determined beforehand that the Council's propaganda was "subversive, un-American, or attacked the principle of the form of government as guaranteed by our Constitution" within the meaning of House Resolution 5?

(c) Was it so authorized even though the Council's propaganda was not "subversive" or "un-American" and did not attack "the principle of the form of government as guaranteed by our Constitution" within the meaning of House Resolution 5; and was the Council's propaganda of such a nature?

(d) Was it so authorized if the Council's propaganda was consistently critical of the foreign policy of the administration; and if so, was that propaganda of such a nature?

(e) Was the Committee authorized to compel the production of any records of any organization engaged in dissemination of propaganda and to compel disclosure of the identity of the authors or editors of the propaganda, regardless of the nature of the propaganda?

2. If the Committee was authorized as stated in the various subsections of paragraph 1, do such several authorizations violate the First, Fifth, Ninth and Tenth Amendments to the Constitution?

3. Was the subpoena *duces tecum* served on petitioner by the House Committee on Un-American Activities, requiring the production of "all books, records, papers and documents showing all the receipts and disbursements of money by the National Council of American-Soviet Friendship, Inc., and all correspondence, memoranda and communications with all persons," in violation of the Fourth Amendment to the Constitution because of its vagueness and generality, its failure to specify the papers desired, and the lack of probable cause for a belief that the papers sought were pertinent to the Committee's authority?

4. Did the trial court err in refusing to permit petitioner to prove that the documents requested and the question asked, in connection with which petitioner was convicted, were not pertinent to any matter of inquiry committed to the Committee by Congress, were outside the scope of the authority of the Committee and of Congress, and were not in aid of a legislative function; did this ruling deny the petitioner constitutional rights under the First, Fifth, Ninth, and Tenth Amendments?

5. Did the trial court err in denying the appellant compulsory process to obtain relevant material in the Committee's files; did this ruling deny the petitioner his rights under the Sixth Amendment and due process of law under the Fifth Amendment?

6. Did the trial court err in refusing to exclude from the jury all government employees?

7. Did the trial court err in refusing to permit the questioning of government employees who were members of the jury panel as to the possible effect of such employment on their ability to reach an impartial verdict?

8. Did the trial court err in charging the jury that "willfully" as used in United States Code Title 2, Section 192 required only that the petitioner had acted intentionally and deliberately, as contrasted with accidentally and inadvertently, and in excluding proffered evidence relative to petitioner's good faith and lack of bad purpose.

9. Was the petitioner properly convicted of violation of Rev. Stats. §102 in the absence of evidence that there was a quorum of the Committee present, and despite the fact that no quorum was in fact present at the time of the commission of the alleged contempt?

10. Is the authority of the House Committee on Un-American Activities to compel testimony and the production

of documents under the sanction of punishment for contempt, on its face and as applied generally and in the present case, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments?

11. Is the resolution establishing the House Committee on Un-American Activities, on its face and as construed and applied by the Committee, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments?

Reasons for Granting the Writ

The writ should be granted because (1) the issues involved have not heretofore been determined by the Court; (2) they are of great public importance; (3) the decision below contravenes principles established by decisions of this Court. We will discuss these reasons for granting the writ in connection with each of the questions presented by this petition.

1. *The authority of the House Committee on Un-American Activities to subpoena financial records and correspondence of the Council and to require the disclosing of the identity of the editors of the Council's publication.*

This case presents to this Court the problem as to whether the Committee was authorized to compel the production, under penalties for contempt, of the financial records and correspondence of the Council and to require the disclosure of the identity of the editors of the Council's publications without cause or basis relevant to its jurisdiction. Leaving aside for the present the question of the constitutionality of the Resolution establishing the Committee on its face, the Committee concededly might have the power to compel the production of propaganda material from any organization as a preliminary step to deter-

mining whether that propaganda fell within the language of its authorizing Resolution. Presumably, if the propaganda did, the Committee would be authorized to investigate the organization that issued the propaganda. Conversely, if the propaganda did not, the Committee could proceed no further. On this basis, the Council contended before the Committee, that the Committee could not compel the production of its financial and membership records or the disclosure of the identity of the editors of the Council's publication, unless it was first established that the propaganda of the Council, which the Council willingly furnished, was of the nature described in the resolution authorizing the Committee. Obviously, this position was sound and the only possible basis upon which the jurisdiction of the Committee could be determined. The alternative to this position is to assert that the Committee could require the production of the financial records of any organization whether or not there was the slightest basis for believing that its propaganda was of the nature described by the resolution establishing the committee. But this was essentially the position taken by the Committee members and its staff.

The position of the Committee members and staff is best illustrated by the following colloquy when Mr. Lamont was on the stand before the Committee on February 6, 1946. This was after the Council had supplied the Committee with substantially all its propaganda but had refused to turn over its financial and membership records. The Committee was still insisting that this latter be done.

> Mr. Mundt. I never heard of your organization, and I am interested, as you are, in improving friendly relationships between the Soviet Union and this country (R. 241).
>
> Mr. Bonner. He asked you if you were willing to let our investigators go in and make an investigation.

This is the only thing that makes me suspicious about these witnesses that come in here and they make a nice witness and I go along with them, and then when they get to the place where they have got something that we want, they want to hide it. I am willing to go along with pretty nearly everything you say myself, but when you have got something you want to hide, I get suspicious.

• • • • •

Mr. Bonner. . . . Some organizations, yours and one other, have shown considerable reluctance, *which reluctance, in my opinion, is the only element of suspicion about the organization.* I just can't understand why an organization functioning in America should refuse to let a committee of Congress look at its records. (R. 242-243, emphasis added).

The colloquy continued, with Mr. Bonner talking:

If you force us to take action we have got to either abolish the committee and say there shouldn't be any investigation at all of anybody anywhere, or else we have got to have a thorough look at the records and arrive at the conclusion that everything is OK. In your case from the evidence you have given us, it probably is.

Mr. Lamont. Well, you see, I just don't understand why you should be investigating us at all. The worst Mr. Adamson says about our literature is that it has political propaganda in it. He didn't say it was un-American or subversive.

Mr. Adamson. That is all I have seen of your records. (R. 243).

Similarly, in response to a letter from Mr. Lamont to members of the Committee protesting against the Committee's continued insistence that the Council produce its records, Mr. Mundt, a member of the Committee, replied on February 11 as follows:

I continue to hope and to believe that as your letter says, your organization has nothing to conceal.

> Frankly, it has until very recently been my belief that our investigation of your books would prove that statement to be a fact. I must admit, however, that your persistent effort to take every possible step to keep a shroud of secrecy around your contributors and prevent our representatives from looking at your files have raised some doubts in my mind. In all events, it has been the experience of our Committee that organizations with nothing to conceal are perfectly willing to cooperate with our staff members whereas those about which there seems to be some doubt are inclined to grasp at every technicality to confuse the issue and conceal their supporters and associates. (R. 247-248).

Thus, in essence the position of Committee members and staff was that the Committee could compel the production of the Council's records, because it could compel the records of any organization, whether or not its propaganda placed it within the Committee's jurisdiction. Indeed, the insistence by an organization on its legal and constitutional rights to withhold from the Committee records which the Committee had no power to request, constituted, in itself an "element of suspicion." Further, under the test laid down by Congressman Mundt, organizations would necessarily fall within the jurisdiction of the Committee unless they voluntarily furnished all of their records to the Committee. Other bases for jurisdiction advanced by the Committee members or staff, although somewhat differently phrased, did not depart substantially from this basic position that the Committee could demand anything and everything. Thus the counsel for the Committee insisted that the Council turn over its records because the material of the Council contained "political propaganda" (R. 234-235). When petitioner was on the stand, Congressman Mundt asserted the Committee's right to demand information about the identity of the editors of the Council's publication on the ground that the publication contained statements "about

the wisdom . . . of which we have doubts" (R. 14). At the trial itself the only bases for jurisdiction that could be offered by the Chairman of the Committee, Congressman Wood, was that one of the Committee's purposes "was to take specific action against anti-Soviet propaganda aimed at dividing the United Nations," and that the Committee had obtained a certificate from the Treasury Department which authorized financial contributors to deduct their contributions from their income tax returns. (R. 119-120).[3]

The record contains no evidence as to the judgment or findings of the Committee as a Committee, and as we discuss below, the repeated requests of the petitioner that the Committee produce its records pertaining to the Council were rejected by the Court. The petitioner wished these records in order to prove that the Committee had not in fact made the judgment that the Council's literature was of a nature that brought it within the resolution. Thus, on all the available evidence, it is clear that the Committee was demanding the production of the financial records of the Council, even though the Committee members did not regard the Council's propaganda to be of the nature described in the authorizing resolution. Indeed, the only reasonable inference from the evidence set out above, is that the Committee would classify the propaganda not on the basis of its content, but on the basis of the persons who wrote, subscribed to or financed the propaganda. Such an *ad hominem* test, we suggest, is clearly unreasonable and not warranted by the resolution. In addition, the implications of such a test are that the Committee may require

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[3] According to the chairman, this combination of circumstances indicated to him that the Government was helping to "finance the propaganda against the Government and in favor of Soviet Russia". (R. 119-120). The appellate court, on the other hand, stated that the purpose of the Council "to take specific action against anti-Soviet propaganda aimed at dividing the United Nations" may have been innocent enough in itself". (R. 440).

the production of the financial and membership records of any and every organization.

This insistence of the Committee that it had the right to compel the production of all the records of every organization "functioning in America," without regard to the nature of the propaganda issued by that organization, cannot be reconciled with the statement of this Court in *McGrain* v. *Daugherty*, 273 U. S. 135 at 176, that "a witness [before a Congressional committee] rightfully may refuse to answer where the bounds of power are exceeded or the questions are not pertinent to the matter under inquiry." Nor can this claim of limitless authority be reconciled with the repeated assertions by this Court that the power of Congress to investigate is limited to inquiries serving a legislative function. *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, *supra*; *Jurney* v. *MacCracken*, 294 U. S. 125.

Under our Constitution, there necessarily are limits on the extent to which the federal government may inquire into private affairs. At the very least, the Committee must be held, under the Constitution, to the duty to determine that propaganda is within the scope of its inquiry authority before it can compel those issuing the propaganda to surrender to the Committee all details concerning themselves. Indeed, the obligation to make such a determination arises not only from the Constitution, but is, we believe, implicit in the Committee's own charter. It is important that this Court establish this principle both to preserve the civil liberties of the people and for the guidance of investigating committees.

The court below disagreed with the Committee as to its claim of limitless authority, and agreed with petitioner that the Committee could compel the production of the Council's financial records only if it first found that the Council's propaganda was of a nature which permitted such

compulsion. Thus under the doctrine of the Court of Appeals established in this case, the failure of the Committee to conclude as a necessary preliminary step that the propaganda of the Council was of a nature to bring the Council within the jurisdiction of the Committee, requires reversal. The Court of Appeals, however, erroneously stated that the Committee had made such a judgment. Since this finding of the court below was, as we have shown above, without support in the record, and contrary to the evidence in the record, this Court should reverse the conviction.

The court below went on to state that this non-existent judgment of the Committee was reasonable because the propaganda of the Council was "consistently critical of the foreign policy of the United States." But clearly it was not the function of the court to make such a judgment where the Committee itself had made none. In addition, this statement of the court below is erroneous on two grounds. First, it has no factual support in the record; second, the facts assumed do not support the conclusion of the court.

On the record before the court, the statement that the propaganda of the Council was "consistently critical of the foreign policy of the United States," is not only factually inaccurate but manifestly absurd. The Council was formed during the war, when it was the stated policy of our government to promote friendship with the Soviet Union. Such was still the stated policy of our government at the time of the Committee's request for the records of the Council. From the date of the founding of the Council to the date of the alleged contempt, the record shows consistent and effective cooperation between the Council and the State Department.

The Committee's first demand for the Council's financial records preceded by one day a rally held by the Council in Madison Square Garden to which President Truman and General Eisenhower sent messages of greeting in the inter-

est of American-Soviet friendship (R. 245, 246). The latter stated: "American-Soviet friendship is one of the cornerstones on which the edifice of peace should be built. To achieve this friendship nothing is more important than mutual understanding on the part of each of the institutions, traditions and customs of the other."

Dean Acheson, then Under Secretary of State, spoke at that meeting and placed strong emphasis on the importance of the Council's efforts at American-Soviet friendship. He said: "I confess I see no way to draw our people into closer understanding except by persistent efforts, on both sides, to free the lines of communication through the press and the radio, through books and magazines, through the exchange of knowledge, and culture, and through travel and personal acquaintance" (R. 246-247).

Almost simultaneously with the alleged contempt, the Council held a dinner at which the featured speaker was Lt. General Walter Bedell Smith, our then Ambassador-designate to the Soviet Union. Among the propaganda distributed by the Council which the Court of Appeals found to be "consistently critical of the foreign policy of the United States" were the speeches of Acheson, General Smith, General Eisenhower, and the then Secretary of Commerce, Henry A. Wallace (R. 243-247). It can indeed, truthfully be said that during the period in question, 1943 through 1945, when it was the stated policy of our government to promote friendship with the Soviet Union, it was the Committee and not the Council that was "consistently critical of the foreign policy of the United States."

But even if the lower court's statement with regard to the nature of the Council's propaganda were factually true, nevertheless, no portion of the resolution establishing the Committee covers criticism of our foreign policy. The Court of Appeals said that the Council's literature, since it consistently criticized our foreign policy, attacked the

"principle of our form of government." The court attempted to bolster this obvious *non sequitur* by labelling as "obtuse" those who failed to follow its faulty logic. The opinion significantly failed to indicate what principle of the form of the government had been attacked by the Council's literature and what portion of the Council's literature so attacked it. For its failure to meet or discuss these issues, the Court substituted disparaging epithets not warranted by the record, such as that the Council's publication was "sometimes shocking," that the Council issued a "flood of propaganda pro-Soviet in character," and that it gave "unstinted praise of the communistic regime in Russia." (R. 440-441). This disparagement also overlooks the simple circumstance that an organization seeking to promote friendship with the Soviet Union will hardly disseminate anti-Soviet propaganda. Obviously, the Court of Appeals has simply equated its own notions as to our correct foreign policy with some basic unstated principle of our form of government.[4]

There is certainly nothing in the language of the Resolution on its face which supports the court's conclusion that propaganda critical of our foreign policy is covered by the Resolution. And the court's construction of the Resolution that it authorizes, under the penalty of contempt, the production of the financial and membership records of any organization that is critical of the Administration's foreign policy raises serious constitutional difficulties. As pointed out by the Council in its communications with the Committee, the very request for the Council's financial records carried with it the assertion that the Council's propaganda was "un-American," "subversive" or opposed to our constitu-

[4] By the court's standards the recent foreign policy pronouncement of the American Friends Service Committee maintaining that this government can and should pursue a policy of friendship with the Soviet Union, would constitute an attack on this same unstated principle.

tional form of government, and the Council would have acquiesced in the stigma if it had acceded to the Committee's demands. The court below holds that such a stigma can rightfully be placed on an organization if it advances views critical of our foreign policy. Thus the court is holding that the resolution is to be interpreted not in terms of some defined legal standard but solely on the basis of a political judgment as to what is or is not a correct foreign policy. The case therefore poses to this Court the problem as to whether the actions of the Committee and the courts below can be reconciled with the doctrine of this Court that it is not the business of government to determine whether the opinions of its citizens are true or false, orthodox or unorthodox. See *W. Va. Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642; Jackson J. concurring in *Thomas* v. *Collins*, 323 U. S. 516, 545.

Further, the opinion of the court below, with its animadversions as to the nature of the Council's and petitioner's opinions, gives substance to the boast of Attorney General Clark that the various prosecutions for contempt of the Committee were not for the vindication of the powers of Congress to investigate, but rather for the suppression of certain political opinions. *Official Department of Justice Press Release*, June 30, 1949, at p. 36; *Text of radio speech by Attorney General Clark over Gannet Radio Stations*, June 12, 1949, at p. 4.[5] Such an approach marks a fundamental change in our basic concept of the relationship of

[5] The cited press release reports the achievements of the Department of Justice during Attorney General Clark's four-year term of office. The report lists the contempt cases as achievements not in the field of vindicating Congress' powers of investigation but in the field of "subversive activities." In the radio speech, Mr. Clark cited the cases brought to punish contempt of the Committee on Un-American Activities as instances where the Department of Justice had "proved that Communist subversion can be defeated under Constitutional processes." Mr. Clark, in other words, finds that the contempt statute is a handy way of constitutionally punishing political opposition.

government to its citizens, and requires review by this Court.

The action of the House Committee and the courts below also presents to this Court important questions as to the meaning of the Fourth Amendment. The evidence set out above indicates that in the judgment of Committee members and staff, a preliminary investigation of the propaganda of the Council had disclosed nothing which brought the Council within the scope of the Resolution. The Committee, nevertheless, wished the Council to produce all its records, papers and documents, on the theory that if the Committee's investigators continued to look through the Council's records and files, they might come up with something. But this assertion of an unlimited right of access to the private papers of a person or association in order to discover whether there is something that might be of interest to the Committee is prohibited by the Fourth Amendment. See *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298; *Hale* v. *Henkel*, 201 U. S. 43. The issue here is not one of the power of Congress to investigate but rather whether Congress has power to investigate without limit or cause. See *Sinclair* v. *United States*, 279 U. S. 263. If a Congressional Committee may require the production from any individual of any or all his papers or documents solely on the ground that such papers or documents might contain something of interest to the Committee, then very little is left of the "right to be let alone." Brandeis, J. dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 487; see *Jones* v. *S.E.C.*, 298 U. S. 1, 25, 26, 28.

2. *Issue of Judicial Review in Contempt Proceedings under U.S.C. Title 2, Sec. 192.*

We have indicated that the ruling below marked an abandonment of the doctrine of this Court that a witness

is not guilty of contempt of Congress unless the information sought from him was pertinent to the matter before the Committee. The trial court's rulings denying the petitioner the opportunity to prove affirmatively that the information sought was not pertinent to any legitimate Congressional inquiry unmistakably emphasizes this conclusion.

At the trial the petitioner offered evidence to prove that the House Committee was not, in connection with the petitioner, acting within the power committed to it by Congress, but was acting beyond the scope of the authority of the Committee or of Congress. The petitioner attempted, but was not permitted, to introduce proof that the documents requested and the question asked of him had no relation to any legitimate inquiry by the Committee, and that these actions were taken by the Committee solely for the purpose of obtaining names of individuals whom the Committee could then pillory and blacklist. The Court of Appeals sustained this exclusion on the ground that there was a presumption that the information sought by Congress would materially aid Congress in legislation, and that this presumption could not be "rebutted by impugning the motives of individual members of the Committee." But this misstates what petitioner offered to prove. Petitioner made no effect to impugn the motives of individual Committee members in conducting a legitimate inquiry, but offered instead to show that the inquiry was illegitimate. He wished to prove that the Committee, as a Committee, had formally met and resolved to obtain the names of members of and contributors to the Council in order to pillory and blacklist them, and that the Committee, as a Committee, had no legislative purpose in requesting the records of the Council. To this end, the petitioner sought to obtain the records of the Committee with relation to the Council, a request which was denied.

The formula stated by the court below means that any effort on the part of a defendant charged with contempt to show that he was summoned for a non-legislative purpose will always be rejected on the ground that it "impugns motives." In essence, the court below is saying that abuse of authority by a Congressional committee is not subject to judicial review, thus overruling the long-established doctrine of this Court that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress' limited powers. *Kilbourn* v. *Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; *McGrain* v. *Daugherty*, 273 U. S. 135; *Jurney* v. *MacCracken*, 294 U. S. 125.

If the decision below stands, nothing is left of Justice Brandeis' assurance that "assertions of Congressional privilege are subject to judicial review" *Jurney* v. *MacCracken, supra*, at 150. And see 26 Cong. Globe 439, 440, 34th Cong., 3d Sess., remarks of Senator Bayard relating to passage of the contempt statute, for Congress' own realization of the need for judicial review to protect individuals from unwarranted legislative inquisition. *Cf.* 8 Wigmore, Evidence (3d ed.) § 2195, p. 80. Under principles long established, it is clear that the contempt statute may not be constitutionally applied to petitioner if the proffered proof, which was excluded, would have demonstrated that the inquiry involved was not within Congress' powers. *In re Chapman*, 166 U. S. 661; *Sinclair* v. *United States, supra; Jurney* v. *MacCracken, supra.*

By thus denying the right of judicial review to one brought into court on a charge of contempt under United States Code, Title 2, sec. 192, the court below has repudiated our constitutional form of government. It is necessary, therefore, that this Court review and reverse the dangerous doctrine established by the decision below that when legislative committees invoke the sanctions of the statute, the

courts will not permit the defendant to prove that the committee was acting outside its jurisdiction and that of Congress.

In order to prove its contention that the documents sought by the Committee were not pertinent to the Committee's jurisdiction, the petitioner sought material in the possession of the Committee relating to the Council (R. 32-39). These requests of the petitioner were denied by the trial court on the ground that the trial court would not interfere with Congress (R. 83-85, 111-113, 122-123), although government counsel had full access to the files of the Committee and introduced into the record considerable material from those files (R. 70, 71, 75, 76, 77, 97, 121, 122). A trial is palpably unfair if the defense is refused access to material to which the prosecution has full access, and from which it can select at will. The material requested by the petitioner was relevant if it would have proven, as petitioner believed, that the Committee was not requesting the documents for any legislative purpose but for the sole purpose of adding names to its blacklist and to facilitate its efforts to destroy the Council (R. 169). To deny to one charged with crime the right to subpoena relevant documents in the possession of the government agency which initiates the prosecution is to deprive him of his right to compulsory process as secured by the Sixth Amendment and his right to due process of law as guaranteed by the Fifth Amendment. *United States* v. *Andolschek*, 142 F. (2d) 503; *United States* v. *Beckman*, 155 F. (2d) 580; *United States* v. *Grayson*, 166 F. (2d) 863; *United States* v. *Krulewitch*, 145 F. (2d) 76.

3. *The Jury Issue.*

In *Frazier* v *United States*, 335 U. S. 497, this Court considered it to be a serious question whether government employees could lawfully sit as jurors in a federal prosecution for violation of the narcotics laws. Indeed, four members

of the Court were of the opinion that they could not. It is clearly an even more serious question whether government employees may serve as jurors in a case where the defendant is the Executive Director of an organization placed on the Attorney General's "subversive" list, pursuant to an Executive Order making "sympathetic association" by government employees with such organizations grounds for discharge.[6]

The vice of government employees as jurors in a case of this sort arises not only from their possible fear of loss of employment, although this in itself is an important factor. By an ordinary process of rationalization, persons who must adopt certain attitudes under coercion tend to conceal their submissiveness from themselves by embracing these attitudes as desirable. As stated in the *Frazier* dissent, the federal government demands of its employees "unquestioning ideological loyalty" (at p. 515). Such loyalty, once yielded for a time cannot be easily shed when the employee takes a seat in the jury box, and it is more likely that he will share, and be influenced by, the hostility shown by the President and the Attorney General to the Council.

The issue here raised is the same as that for which this Court has granted certiorari in *Dennis* v. *United States*, U. S. No. 14, October term, 1949, cert. granted June 27, 1949.

In the *Dennis* case in the Court of Appeals, the opinion justified the ruling of the trial court permitting government employees to serve on the jury partly on the ground that "prospective jurors were carefully interrogated by the court and counsel." *Dennis* v. *United States*, 171 F. (2d) 986, 991. The present case is more extreme, since here the trial court did not permit questioning of government work-

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[6] Executive Order 9835 issued March 12, 1947, 12 Federal Register 1935. The designation of the Council on the Attorney General's list was released to the press on December 4, 1947, before the date of the trial. See Washington Post, December 5, 1947.

ers as to the effect their government employment, the Loyalty Order, and the designation by the Attorney General of the Council as a subversive organization might have on their verdict (R. 57, 58, 60-65). This ruling was directly in conflict with the language of this Court in *United States* v. *Wood*, 299 U. S. 123, where this Court said with regard to the problem of government employees serving as jurors:

> The law permits full inquiry as to actual bias in any such instances . . . we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused. (at p. 150).

4. *The Quorum Issue.*

The record fails to disclose any evidence that a quorum of the Committee was present at the hearing at which the petitioner appeared. Accordingly, the conviction was erroneous under *Christoffel* v. *United States*, No. 528, October Term, 1948, decided June 27, 1949, for the reason that an essential element of the crime charged—the presence of a competent tribunal—was not proved. Unfortunately, this issue was not raised at the trial nor in the Court of Appeals, an omission which was understandable, in view of the fact that the decision in the *Christoffel* case, reversing the Court of Appeals, was not handed down until June 27, 1949.

This Court has held that questions which have not been raised below may be considered by the Court, if, and only if, such consideration is necessary to prevent a "plain miscarriage of justice". *Hormel* v. *Helvering*, 312 U. S. 552, 558. The petitioner has informed his counsel that only three members of the nine-member Committee attended the hearing at which he appeared, with one of such members leaving before the petitioner refused to answer the question or produce the documents for which refusals he was convicted.

Under all the circumstances, a miscarriage of justice will result if petitioner's conviction is permitted to stand despite the fact that an essential element of the crime charged was not proved at the trial, and did not in fact exist.

5. *The Issue as to the Construction of the Word, "Willfully," in U.S.C. Title 2, Sec. 192.*

The trial court charged the jury that the word "willfully" as used in U.S.C. Title 2, sec. 192 required only that the petitioner had acted intentionally and deliberately, as contrasted with accidentally and inadvertently. In accordance with this interpretation, the trial court excluded evidence relative to the petitioner's good faith and lack of bad purpose. But this statutory construction is in conflict with the decisions of this Court in *United States* v. *Murdock*, 290 U. S. 289; *Hartzell* v. *United States*, 322 U. S. 680; *Screws* v. *United States*, 325 U. S. 91, as well as with the legislative background of the statute. See 34 Cong. Globe 405, 406, 34th Cong. 3rd sess., remarks by Representative Orr.

6. *Issue of Constitutionality of the Committee.*

Counsel in this case have already fully presented their arguments regarding the unconstitutionality of the Committee in *Eisler* v. *United States*, No. 255 of last term. We repeat only that this issue is of great public import and that the constitutionality of the Committee is at least questionable under long-established doctrines of this Court.

Conclusion

The writ of certiorari should be granted, and the judgment below should be reversed with the direction that the indictment be dismissed.

Respectfully submitted,

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